U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted] Public Copy

File: EAC 99 065 52747 Office: Vermont Service Center Date: JAN 24 2000

IN RE: Petitioner: [redacted]
Beneficiary

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(ii)(b)

IN BEHALF OF PETITIONER: [redacted]

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: This is a motion to reconsider the Associate Commissioner for Examination's decision withdrawing the approval of the nonimmigrant visa petition. The motion to reconsider will be granted and the previous decision affirmed.

The petitioner desires to employ the beneficiary as a live-in nanny, for his one-year-old daughter, for a period of one year. The Department of Labor determined that a temporary labor certification by the Secretary of Labor could not be made. The director determined that a temporary need had been established and approved the petition. The director certified his decision to the Associate Commissioner for Examinations for review. Upon review by the Associate Commissioner, the director's decision was withdrawn and the petition was denied.

On motion, counsel states that the decision is contrary to Service regulations and the approval of the petition is warranted.

Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(ii), defines an H-2B temporary worker as:

> an alien...having a residence in a foreign country which he has no intention of abandoning, who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession....

Matter of Artee Corp., 18 I&N Dec. 366 (Comm. 1982), as codified in current regulations at 8 C.F.R. 214.2(h)(6)(ii), specified that the test for determining whether an alien is coming "temporarily" to the United States to "perform temporary services or labor" is whether the need of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties, that is controlling. See 55 Fed. Reg. 2616 (1990).

As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor must be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. 8 C.F.R. 214.2(h)(6)(ii)(B).

The petition indicates that the employment is a one-time occurrence. The regulation at 8 C.F.R. 214.2(h)(6)(ii)(B)(1) states that for the nature of the petitioner's need to be a one-time occurrence, the petitioner must establish that it will not

need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

The nontechnical description of the job on the petition itself and the Application for Alien Employment Certification (Form ETA 750) indicates the position is for a nanny. The duties are described on Form ETA 750 as "complete responsibility for the care and supervision of an infant, including shopping for and preparation of infant's meals, care of infant's clothes and room, cleaning, laundry, providing happy and safe environment for the infant." These duties are ongoing and cannot be classified as duties that will not need to be performed in the future. Consequently, the petitioner has not established that the nature of its need for a live-in nanny is temporary is nature.

Counsel states on motion that the petitioner's need for a live-in child monitor is a temporary event of approximately one year. Counsel goes on to state that once the child is admitted to a nursery, the petitioner will not require the child monitoring services.

In the petitioner's letter dated December 18, 1998, he states that "we intend to place our daughter in a nursery school when she will be two years old and be able to be outside of home." The record contains a copy of the petitioner's child's U.S. passport. The petitioner's child, who was born on January 6, 1998, is presently two years old and able to attend a nursery school.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not met that burden. Accordingly, the previous decision of the Commissioner will be affirmed.

ORDER: The order of March 9, 1999 is affirmed.